

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OUT WEST RESTAURANT GROUP INC.,  
et al.,

Plaintiffs,

v.

AFFILIATED FM INSURANCE  
COMPANY,

Defendant.

Case No. [20-cv-06786-TSH](#)

**ORDER RE: MOTION TO DISMISS**

Re: Dkt. No. 13

**I. INTRODUCTION**

Plaintiffs brought this action claiming that Defendant refused to pay their claims for coverage under an insurance policy after they sustained covered monetary losses due to the COVID-19 pandemic. Pending before the Court is Defendant's Motion to Dismiss and Motion to Strike pursuant to Federal Rules of Civil Procedure 41 and 12(f). ECF No. 13. Plaintiffs filed an Opposition, ECF No. 14, and Defendant filed a Reply, ECF No 15. Having considered the parties' positions, relevant legal authority, and the record in this case, the Court **GRANTS** Defendant's motion for the following reasons and dismisses with leave to amend.

**II. BACKGROUND**

Plaintiff Out West Restaurant Group, Inc. is a restaurant management company. Compl. ¶ 9, ECF No. 1. It is the exclusive franchisee of Outback Steakhouse restaurants in Arizona, Colorado, Nevada, and New Mexico and the predominate franchisee in California. *Id.* Plaintiff Cerca Trova Steakhouse is an entity that holds leases for all California restaurants and Plaintiff Cerca Trova Southwest Restaurant Group is an entity that holds all of the leases for the non-California restaurants. *Id.* ¶¶ 10-11. Plaintiff Cerca Trova Restaurant Group, Inc. ("Cerca Trova")

1 is the “ultimate parent of the Out West entities.” *Id.* ¶ 12. Defendant Affiliated FM (“Affiliated”) is an insurance company.

3 Cerca Trova purchased an insurance policy (the “Policy”) from Affiliated which insures  
4 Cerca Trova along with its subsidiaries, the other Plaintiffs (collectively, “Out West”). *Id.* ¶¶ 27,  
5 33-34. The Policy had an effective date of February 15 through December 1, 2020 and covers Out  
6 West for “all risks of physical loss or damage” except as excluded by the Policy. *Id.* ¶¶ 28, 31.  
7 The COVID-19 pandemic and presence of the virus in the air makes restaurant properties with  
8 outdoor or indoor dining spaces unusable and unfit for normal occupancy. *Id.* ¶ 90. Also, the  
9 presence of the virus at Out West’s locations, including on surfaces, causes physical alteration of  
10 the integrity of the property and causes physical loss. *Id.* ¶ 89. According to Out West, these  
11 conditions constitute “loss” and “damage” under the Policy. *Id.* ¶¶ 80-81. The Policy provides  
12 additional coverage including communicable disease and business interruption coverage which  
13 was triggered due to COVID-19 and its effects. *See id.* ¶¶ 110-28.

14 Out West alleges that Affiliated failed to properly investigate and unlawfully refused to  
15 pay its claim for coverage under the Policy. *Id.* ¶ 1. It alleges that Affiliated’s failure to diligently  
16 pursue a thorough, fair, and objective investigation of Out West’s claim and its improper denial of  
17 coverage constitute a breach of good faith and fair dealing. *Id.* ¶ 140. It brings causes of action  
18 for declaratory judgment, breach of contract, and breach of implied covenant of good faith and fair  
19 dealing. *Id.* ¶¶ 160-194.

### 20 **III. LEGAL STANDARDS**

21 Under Rule 8 of the Federal Rules of Civil Procedure, a complaint must contain a “short  
22 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.  
23 8(a)(2). Additionally, “[e]ach allegation must be simple, concise, and direct.” Fed. R. Civ. P.  
24 8(d)(1). “Taken together, Rules 8(a) and 8(d)(1) underscore the emphasis placed on clarity and  
25 brevity by the federal pleading rules.” 5 Wright & Miller, Federal Practice and Procedure, s 1217.  
26 A complaint which fails to comply with Rule 8 may be dismissed with prejudice pursuant to Rule  
27 41(b). Fed. R. Civ. P. 41(b). However, before considering dismissal with prejudice, a district  
28 court can and should consider less drastic alternatives, including dismissal with leave to amend.

1 *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996) (citation omitted). At the same time,  
 2 “[t]he propriety of dismissal for failure to comply with Rule 8 does not depend on whether the  
 3 complaint is wholly without merit.” *Id.* at 1179. The rule “requiring each averment of a pleading  
 4 to be ‘simple, concise, and direct,’ applies to good claims as well as bad, and is a basis for  
 5 dismissal independent of Rule 12(b)(6).” *Id.* (citations omitted).

6 Also, pursuant to Rule 12(d) a party “may move for a more definite statement of a pleading  
 7 to which a responsive pleading is allowed but which is so vague or ambiguous that the party  
 8 cannot reasonably prepare a response.” Fed. R. Civ. P. 12(d). And pursuant to Rule 12(f) a court  
 9 “may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or  
 10 scandalous matter.” Fed. R. Civ. P. 12(f).

11 Lastly, if a plaintiff fails to comply with the Federal Rules of Civil Procedure, a defendant  
 12 may move pursuant to Rule 41(b) “to dismiss the action or any claim against it.” Fed. R. Civ. P.  
 13 41(b); *Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 891 n. 4 (9th Cir. 2019) (“Rule  
 14 41(b) [] permits dismissal when a plaintiff fails to prosecute its case or comply with the Federal  
 15 Rules of Civil Procedure.”).

#### 16 IV. DISCUSSION

17 Affiliated argues that Out West’s Complaint violates Rule 8 because, in Affiliated’s  
 18 telling, it is needlessly long and “impermissibly contains numerous examples of immaterial,  
 19 impertinent, and redundant matters, repetitive allegations,” improper legal arguments and  
 20 “needless citations to ‘evidence’ . . .” MTD at 6. Affiliated argues that requiring it to respond to  
 21 the Complaint would be unfairly burdensome and would require it to expend a “prejudicial”  
 22 amount of time and money to respond to the Complaint. It asks the Court to dismiss with leave to  
 23 amend, or alternatively, to strike a number of allegations.

24 The Complaint complies with Rule 8, however. Affiliated complains about the number of  
 25 paragraphs and plenitude of pages, but “verbosity or length is not by itself a basis for dismissing a  
 26 complaint based on Rule 8(a).” *Hearns v. San Bernardino Police Dep’t*, 530 F.3d 1124, 1131 (9th  
 27 Cir. 2008); *id.* (“[*Agnew v. Moody*, 330 F.2d 868, 870-71 (9th Cir. 1964)] has never been cited by  
 28 this court as standing for the proposition that a complaint may be found to be in violation of Rule

8(a) solely based on excessive length, nor does any other Ninth Circuit case contain such a holding.”). There has to be something more, or rather, something less—dismissal is appropriate where the complaint fails to coherently give fair notice of which claims are being asserted against which defendants and the grounds upon which they rest. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (Rule 8 “requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.”) (citation and internal quotation marks omitted); *Wynder v. McMahon*, 360 F.3d 73, 80 (2nd Cir. 2004) (“Dismissal pursuant to [Rule 8] is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.”); *Garst v. Lockheed–Martin Corp.*, 328 F.3d 374, 378 (7th Cir.2003) (“Some complaints are windy but understandable. Surplusage can and should be ignored.”). Here, that’s not the case. The Complaint is not “replete with redundancy [nor] largely irrelevant,” nor is it confusing and conclusory. *Id.* (citations and internal quotation marks omitted). It perhaps contains a few flourishes of dispensable detail, but it concerns and alleges a fairly complicated insurance dispute in its pages, and overall is “intelligible and clearly delineate[s] the claims” Out West is making. *Id.* True there are several pages of exhibits, but those predominantly consist of the Policy and related documents, which are clearly relevant as foundational to the Complaint.

Turning to some of Affiliated’s specific objections, it homes in on Out West’s several allegations about COVID-19, including the allegations about when the virus arrived in the U.S., studies on the transmission of the virus and the presence of the virus in the air, infection rates, and whether people can be infected even while pre- or a-symptomatic. *See* MTD at 6-9 (citing, *inter alia*, Compl. ¶¶ 40, 71, 73-74, 76, 79-80). But those allegations, along with assertions about how long the virus “can remain on various objects and surfaces,” Compl. ¶ 77, are relevant because—as Out West’s headings indicate—they relate to whether Affiliated had knowledge of the virus when it issued the Policy, whether the virus constitutes a “communicable disease” under the Policy, and Out West’s theory as to how COVID-19 causes physical loss and/or damage to property that is covered by the Policy. If anything, Out West puts Affiliated on enhanced notice

1 by making clear what legal theories it is alleging.

2 Out West’s allegations describing the Outback Steakhouse restaurant chain (paragraphs 17-  
3 22) might not from top to bottom contain information that is strictly necessary (e.g., “the famous  
4 Bloomin’ Onion®,” Compl. ¶ 17), but those allegations do tell us what type of business Out West  
5 is running (“in-restaurant dining with in-house bars,” *id.* ¶ 21) and thus give us an idea of what  
6 type of impact “emergency public health orders and ‘shelter-in-place’ directives,” *id.* ¶ 158, might  
7 have had on that business. And a plaintiff doesn’t run afoul of Rule 8 (or any other pleading rule)  
8 by saying a smidgen of nice things about its business or by crafting a complaint which tells a bit of  
9 a story.

10 On the whole, the Complaint does what it is supposed to do—give Affiliated fair notice of  
11 the claims asserted against it in plain enough terms that the claims can be understood without too  
12 much difficulty. That task is made easier because the Complaint is well organized and contains  
13 subheadings which make it easy to understand what Out West is trying to say with each batch of  
14 allegations it makes. Even if Affiliated has to cut through a brush of some relatively exhaustive  
15 allegations, the pleadings make sense and it’s not impossible to arrive at the clearing where it  
16 becomes “plain” what loss Out West alleges it has suffered that is covered by the Policy and why.  
17 The Complaint satisfies Rule 8.

18 For those same reasons, the Court will not exercise its discretion under Rule 12 to order a  
19 more definite statement or strike any of the above-the-line allegations from the Complaint. *See*  
20 *Hearns*, 530 F.3d at 1132 (“[A] district court [] has ample remedial authority to relieve a  
21 defendant of the burden of responding to a complaint with excessive factual detail. One option  
22 [is] to simply strike the surplusage from the [complaint].”) (citations omitted).

23 However, Rule 10(b) of the Federal Rules directs that “[a] party must state its claims or  
24 defenses *in numbered paragraphs*, each limited as far as practicable to a single set of  
25 circumstances,” Fed. R. Civ. P. 10 (emphasis added), and Out West’s extensive use of footnotes  
26 does not comport with that requirement. Moreover, “evidence pleading, as distinguished from the  
27 pleading of ultimate facts, is not favored under the Federal Rules.” *In re Beef Industry Antitrust*  
28 *Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979) (citations omitted). Accordingly, the Court will

1 dismiss with leave to amend for Out West to remove the footnotes from the Complaint. Fed. R.  
2 Civ. P. 41(b).

3 **V. CONCLUSION**

4 For the reasons stated above, the Court **GRANTS** Defendant's motion and **DISMISSES**  
5 the Complaint with leave to amend. Plaintiffs shall file an amended complaint within 30 days.

6 **IT IS SO ORDERED.**

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8 Dated: December 4, 2020

9   
10 THOMAS S. HIXSON  
11 United States Magistrate Judge  
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